Filed 7/31/02 P. v. McCarthy CA6

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GREGORY MARK MCCARTHY, Defendant and Appellant.	H021419 (Santa Clara County Super. Ct. No. C9813371)

A jury convicted defendant Gregory McCarthy of one count of arson of an inhabited structure (Pen. Code, § 451, subd. (b)). The jury found true allegations that defendant used devices designed to accelerate the fire and to delay ignition (Pen. Code, § 451.1, subd. (a)(5)) and that defendant had intentionally caused damage exceeding $1 million (Pen. Code, § 12022.6, subd. (a)(3)). The conviction on the first count arose out of a fire that destroyed the home of defendant's ex-wife's divorce lawyer. Defendant was also convicted of one count of presenting a false and fraudulent insurance claim (Pen. Code, § 550, subd. (a)) regarding an unrelated fire at a karate studio that defendant owned. Defendant was sentenced to 17 years in prison (the upper term of eight years for the arson conviction, the maximum sentence of eight years for the arson enhancements, and one year for the insurance fraud). Defendant was also ordered to pay restitution in excess of $2.3 million to the victims of the house fire and their insurers.

Defendant contends that the court erred (1) in admitting evidence of four incidents involving verbal threats or threatening conduct toward defendant's ex-wife and her divorce lawyer; (2) in admitting evidence that defendant owned books about incendiary devices, alarm systems, and divorce tactics; (3) in excluding evidence of criminal charges filed against a key prosecution witness; (4) in admitting evidence that besmirched defendant's reputation; (5) in admitting testimony regarding conclusions that defendant's nephew drew from one of defendant's statements; and (6) in excluding evidence of defendant's nephew's prior statements to police investigators. Defendant also asserts that the court erred in refusing to modify CALJIC No. 2.20 to advise the jury that they may consider whether a witness is testifying under a grant of immunity when assessing witness credibility. In addition, defendant contends that the jury instruction on reasonable doubt (CALJIC No. 2.90) was constitutionally deficient and that the court erred in instructing pursuant to CALJIC No. 17.41.1. Defendant also claims that the cumulative effect of these errors violated his right to a fair trial. We will affirm.

TRIAL EVIDENCE

A. Prosecution Case: Studio Fire/Insurance Fraud

In 1991, defendant assumed the ownership of the Karate Studio (Studio) and purchased a commercial building in Mountain View to house the school. Defendant obtained a mortgage on the building from Silicon Valley Bank. In December 1993, defendant stopped making the mortgage payments and the bank initiated foreclosure proceedings. Despite the foreclosure, the bank agreed to let the school remain in the building for another year.

In the fall of 1994, defendant had a falling out with one of the instructors and the instructor quit the Studio. Shortly thereafter, nearly one-half of the remaining instructors

left, taking their students with them. More than one person testified that the Studio was not profitable because the mortgage payments were too high.

In the fall of 1994, defendant's nephew, Michael McCarthy, Jr., (Michael)[1] worked at the Studio. At the time, he owed defendant $4,000 on a vehicle defendant had purchased for him. In November 1994, defendant started joking with Michael about burning down the Studio. What started as a joke became more serious. Toward the end of November 1994, defendant offered to forgive Michael's debt if Michael would burn down the Studio. Defendant told him it would be some sort of "retribution" to the bank for taking the building away. Defendant told Michael he wanted it done during the holiday break at the end of December 1994. Defendant even suggested a way to start the fire and drew a diagram for Michael.

Michael was tempted by defendant's offer. Michael, a recovering alcoholic/drug addict, discussed the offer with his Alcoholics Anonymous sponsor. After talking with his sponsor, Michael decided to refuse defendant's offer. However, he agreed to defendant's request that their conversations regarding the offer remain confidential.

On December 24, 1994, defendant told the karate instructors at the Studio to remove their belongings from the locker room so that it could be cleaned. He also told Michael not to visit the Studio during the holiday break. On January 1, 1995, instructors who attempted to work out at the Studio discovered that the locks had been changed. At the end of December 1994, defendant removed several items of personal property from the Studio and placed them in storage.

At about 1:00 a.m. on January 2, 1995, a passerby saw smoke coming from the Studio and called 911. The fire, which was confined to the center of the building, was extinguished. The firefighters determined that the blaze was intentionally set. Arson

---

[1] For ease of reference and not out of any disrespect, we shall refer to defendant's family members by their first names.

investigators found three incendiary devices, only one of which had detonated. An investigation ensued and defendant became a suspect.

During the last week of January 1995, Michael spoke with defendant's son, Gregory McCarthy, Jr., (Greg, Jr.,) by telephone. He told Greg, Jr., who lived back east and was estranged from defendant, about defendant's offer. He also asked Greg, Jr., to keep their conversation confidential.

In November 1995 the police suspended the investigation of the Studio fire because they were unable to confirm a suspect.

On April 15, 1996, defendant filed a sworn statement with the Hartford Insurance Company (the Hartford), claiming losses of $171,980.42 as a result of the Studio fire. As of August 1996, the Hartford had paid defendant $2,947 for the restoration of art and furniture, $10,200 for undisputed business income loss, and $20,658.50 for undisputed personal property loss. In December 1996, the Hartford paid defendant $48,500 in settlement of the remaining disputed claims arising out of the fire. The Hartford paid a total of $82,305.50 to defendant. At trial, there was testimony that defendant had overvalued the items in his insurance claim and that some of the items, which defendant claimed were destroyed, were later seen on his property.

B. Prosecution Case: Danaher Fire

In the spring of 1996, defendant's wife, Kim McCarthy (Kim), decided to file for divorce. Defendant was opposed to the divorce and tried to dissuade Kim from hiring an attorney. About this time, defendant started a romantic relationship with Robin Mann, a nurse who had just started law school at Santa Clara University.

In July 1996, Kim retained James Danaher to represent her in the divorce. Kim moved out of the couple's Portola Valley home. After Kim moved out, Mann stayed with defendant every other week, when he did not have custody of his children. According to Mann, defendant frustrated Danaher's efforts to resolve the divorce by refusing to accept

mail, turning off his fax machine, and refusing to return telephone calls. Defendant viewed Danaher as an obstacle to his efforts to obtain a favorable settlement of the divorce action and told Mann that he really wanted to get rid of Danaher. Defendant bragged to Mann that he had interviewed all of the divorce attorneys in the area to create a conflict of interest so that Kim could not obtain new counsel once Danaher was off the case.

In December 1996, defendant bought 30 books on incendiary devices, timers, detonators, bypassing alarm systems, and other topics that he kept in a box by his bed. According to Mann, defendant read the books all the time; he bragged that he had read each one from cover to cover at least twice. One day, while discussing the divorce and Danaher, defendant told Mann that "he could burn down his house or blow someone up." Defendant threatened to "take care of" Danaher on two other occasions.

Initially, defendant had an attorney for the divorce proceedings. Defendant fired his attorney after a particularly contentious meeting in July 1997 and represented himself thereafter. In October 1997, Mann started sending anonymous letters to Kim and Danaher warning them of defendant's threats to commit violent acts against them and of defendant's efforts to hide community assets. On two separate occasions in December 1997 and January 1998, defendant attempted to run Kim's car off the road when he encountered her near his home. On January 15, 1998, defendant told Danaher that he could get rid of Danaher or Kim for $5,000. That same day, Danaher served defendant with a Notice of Unavailability, advising him that he would be out of town on vacation from January 15, 1998, until February 1, 1998.

The Danahers had arranged for two young women to stay in the guest quarters over their garage while they were away on vacation. The house sitters' last night in the guest quarters was Thursday, January 29, 1998. One of them returned Friday evening to feed the cat. Before she left, she checked to make sure the doors to the house were locked and left the garage door open two feet at the bottom so that the cat could enter, as

instructed by the Danahers. At various times on Friday, January 30, 1998 and Saturday, January 31, 1998, two of Danaher's neighbors saw a distinctive red sports car parked in Danaher's driveway. Both neighbors picked defendant's red Mitsubishi out of a photo line-up.

Mann had invited defendant to dinner both Friday and Saturday nights, January 30 and 31, 1998. Defendant was late both nights. He also spent both nights at Mann's apartment, which was unusual. On Friday night, defendant told Mann that he had been conducting "night maneuvers," which he had described as doing "sneaky things."

At approximately 3:20 a.m. on February 1, 1998, the Danahers' neighbors were awakened by noises and saw flames rising above the Danahers' home. By the time firefighters arrived, the house was 85 to 90 percent engulfed in flames. The house was completely destroyed. At trial, the parties' stipulated that the monetary loss from the fire exceeded $1 million. Arson investigators subsequently determined that the fire was started by a timing device, which had been plugged into an electrical outlet in the crawl space under the house. The timer was connected to an ignition device by an extension cord. The ignition device, in turn, ignited a gas-soaked rag sticking out of a gas can. The device used to start the Danaher fire was very similar to the device that had been used to start the Studio fire. Because of the similarities between the two devices, authorities reopened the investigation into the Studio fire.

After the Danaher fire, Mann lied to police investigators about the times that defendant arrived and left her apartment on the two days before the fire. In the weeks that followed the Danaher fire, defendant made several statements to Mann that indicated that he was involved in the fire.

On February 27, 1998, Michael spoke with sheriff's deputies. He denied any knowledge of either fire and denied speaking to Greg, Jr. He did not tell them about defendant's offer to forgive the debt if he burned down the Studio and told investigators that defendant was not involved. Two days later, defendant asked Michael whether he

had set the Studio fire. Michael was shocked and believed that defendant was going to frame him for the Studio fire. Michael met with arson investigators on May 1, 1998. Once again, he denied knowing anything about either fire and said that defendant was not involved. At trial, he admitted that he lied to investigators on both occasions.

During the latter half of 1998, defendant's relationship with Mann soured. On different occasions, he threatened to report her to her law school for ethical violations, to hire someone to rape her, and to "come after her" if he ever went to jail. Mann finally told investigators that on the two nights before the fire, defendant had arrived at her apartment much later than she had previously claimed and that he had left much earlier each of the following mornings. She also changed her story about the vehicle that defendant was driving on the dates in question. She had previously told them it was a Jeep. She later told them it was the red Mitsubishi. This information shattered defendant's alibi.

In March 1999, Michael was subpoenaed to testify at defendant's preliminary hearing. Michael did not want to lie under oath and retained an attorney. His attorney negotiated an agreement with the district attorney that provided that Michael would be immune from prosecution for his previous false statements to investigators. Michael then told investigators about defendant's offer, Michael's conversation with Greg, Jr., and statements defendant made to Michael about the Studio fire and the investigation.

C. Defense Case

Defendant testified and denied setting either fire or making a false insurance claim. He disputed Kim's and Danaher's accounts of events that occurred during the divorce. Defendant vigorously attacked Mann's credibility. He presented evidence of her "mental and emotional instability, and of bizarre and threatening behavior in which she engaged during the course of their stormy on-again, off-again relationship." He also

attacked Michael's credibility. He had an explanation for almost all of the evidence that was introduced by the prosecution.

DISCUSSION

A. The Admission of Evidence of Defendant's Verbal Threats and Threatening Conduct

On the first day of trial, defendant moved in limine to exclude evidence of (1) four threats defendant had made to Kim, (2) three threats defendant had made to Danaher, (3) eight "unadjudicated criminal acts" arising out of defendant's divorce proceedings, and (4) seven other acts of wrongdoing on the grounds that the evidence was irrelevant, that it was inadmissible character evidence (Evid. Code, § 1101, subd. (a)),[2] and that the prejudicial effect of the evidence outweighed its probative value (§ 352). As to the alleged misconduct in the divorce proceedings, defendant also argued that it would result in undue consumption of time (§ 352) since it would require defendant to relitigate the divorce to defend himself against the arson charge. The prosecution responded that the evidence was relevant since it demonstrated defendant's escalating and intensifying obsession with his divorce, his frustration over his inability to force an advantageous settlement of the divorce action, and his increasing hatred for Danaher. The prosecutor argued that the evidence was relevant to defendant's motive and intent to commit arson and therefore admissible under section 1101, subdivision (b). In addition, the prosecution asserted that the evidence demonstrated defendant's willful and malicious state of mind, which was one of the elements the prosecution had to prove. The court granted defendant's motion in part, finding that 10 of the 22 items at issue were admissible.

On appeal, defendant challenges the court's ruling as to the admissibility of four items of evidence: (1) Danaher's testimony that in January 1998 defendant stated that for

---

[2] Unless otherwise indicated, all further statutory references are to the Evidence Code.

$5000 he could get rid of Kim and anyone else in the room (the only other person present was Danaher); (2) Kim's testimony that in December 1997, when defendant and Kim had encountered each other driving in opposite directions, defendant had pulled into her lane, initiating a game of "chicken"; (3) Kim's testimony that in January 1998, defendant tried to involve her in another game of chicken, forcing her car off the road; and (4) Kim's testimony that in July 1997, after a contentious and unsuccessful mediation in the divorce case, defendant cut a coffee cup in half and sent it to Kim to let her know that she could have half of everything.[3] Defendant argues that this evidence was inadmissible because it was irrelevant, because it was admitted in violation of section 1101, and because its prejudicial effect outweighed its probative value (§ 352). Defendant also asserts that the

---

[3] Defendant does not challenge the portion of the court's order admitting evidence: (1) that in June 1997, after Kim learned that defendant was reading books on incendiary devices and bombs, defendant told her he was not going to bomb her but stated that there were some attorneys he would like to take care of; (2) that in September 1997 defendant complained to Danaher that he (Danaher) was the reason the divorce case was not settling and threatened to take care of Danaher; (3) that in the divorce proceedings defendant had failed to account for more than $80,000 he received in insurance proceeds after the fire at the Studio; (4) that defendant purchased bomb-making literature; and (5) that defendant had threatened Danaher's life.

The court found the following inadmissible: (1) In September 1997, after they had separated, Kim found defendant looking under the seat of her truck. When she asked him to leave, he said "[H]ow do you know I am not planting a bomb in your truck?" (2) defendant waved papers at Danaher and Kim in a threatening manner at a meeting with defendant's divorce lawyer; (3) defendant forged Kim's name on a $5000 check that had been made out to both of them; (4) defendant did not account for cash rental income he received; (5) defendant moved furniture and a piano out of the family home in violation of a restraining order issued in the divorce proceedings; (6) defendant sold a horse trailer for $7500 in violation of the restraining order; (7) defendant was arrested for failing to appear in Family Court; (8) defendant lied to a police officer regarding the restraining order in the divorce action; (9) the opposing party in an unrelated civil action obtained a restraining order against defendant; (10) Danaher's statements that he thought defendant was dangerous and that defendant was the one who burned down his house. There was some duplication among the 22 items at issue.

admission of this evidence violated his right to due process under the state and federal constitutions.

Section 1101 provides in pertinent part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

The trial court's determination regarding the admissibility of evidence pursuant to section 1101 is essentially a determination regarding relevance. (*People v. Kipp* (1998) 18 Cal.4th 349.) "When a trial court overrules a defendant's objections that evidence is irrelevant, unduly prejudicial and inadmissible character evidence, we review the rulings for abuse of discretion," examining the evidence in the light most favorable to the trial court's ruling. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Kipp*, *supra*, 18 Cal.4th at p. 370.)

Defendant argues that evidence that defendant told Danaher that he could get rid of Kim and Danaher for $5000 was inadmissible because evidence of threats to kill "has generally only been found admissible to prove *homicidal* intent, in *murder* cases." Defendant contends that since he was charged with arson and not murder, the prosecution did not have to prove homicidal intent and the evidence was therefore inadmissible. Defendant relies on *People v. Rodriguez* (1986) 42 Cal.3d 730, 757 (*Rodriguez*) for the proposition that evidence of threats to kill are only admissible to prove homicidal intent in murder cases. The defendant in *Rodriguez* was convicted of murdering two highway patrol officers. On appeal, the defendant challenged the admission of the testimony of

several witnesses that they had heard defendant express hatred for the police and declare that he would kill any officer who attempted to arrest him. (*Id.* at p. 756.) The court stated: "A defendant's threat against the victim, however, is relevant to prove intent in a prosecution for murder. [Citation.] The statements here in question did not specify a victim or victims but were aimed at any police officer who would attempt to arrest appellant. Such a generic threat is admissible to show the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threat." (*Id.* at p. 757.) The court found that the statements were relevant and admissible under section 1101. While *Rodriguez* holds that evidence of threats, even generic threats, are admissible in murder cases, it does not state that evidence of threats to kill are only admissible in murder cases or inadmissible in cases involving other types of crimes. Defendant's reliance on *Rodriguez* is therefore misplaced.

People v. Lew (1968) 68 Cal.2d 774 is, likewise, of no assistance to defendant. The *Lew* court held that while evidence of death threats is highly relevant to determining intent in a murder case, the evidence in that case was inadmissible because it was double hearsay. (*Id.* at pp. 777-778.) The *Lew* court did not limit the admission of death threats to murder cases.

Defendant argues that the case for the admission of his threats[4] toward Kim "was weaker yet," since Kim was not the victim of the arson. Defendant cites *People v. Johnson* (1993) 6 Cal.4th 1, a murder case, in which the court held that while evidence of a threat to kill someone other than the murder victim made two months after the charged murder "seemingly [had] little relevance to the issue of defendant's guilt, it is at least

---

[4] Defendant does not distinguish between his verbal threat that he could get rid of Kim for $5000, his threatening conduct toward Kim during the two incidents on the road or the incident involving the coffee cup he had sawed in two. For the purposes of our discussion, we shall follow defendant's lead and discuss the threats against Kim as a group.

arguable the threat confirmed defendant's intent or state of mind to kill those who opposed him." (*Id.* at p. 34.) While the court suggests that the threat had little relevance, it did not find the evidence irrelevant.

Furthermore, in *People v. Barnett, supra*, 17 Cal.4th at page 1118 the court held that evidence of death threats the defendant made to someone other than the murder victim was relevant "for purposes of shedding light on the roots of defendant's hostility toward [the murder victim] and demonstrating a motive for the torturing and killing of [the murder victim]." One year prior to the murder, the defendant in *Barnett* had threatened to kill Christine Racowski. The defendant's murder victim, Rich Eggett, urged Racowski to report the incident to the police, which she did. During the attack that led to Eggett's death, the defendant mentioned that Eggett had turned him in for assaulting Racowski.

The Attorney General argues that the evidence of the threats to Kim and Danaher was relevant because it illustrated defendant's "'escalating negative spirit' " toward his divorce and his hostile feelings toward Kim and Danaher during the months before the fire, which in turn were relevant to the issues of defendant's motive and intent to commit the arson. The Attorney General also argues that the evidence was relevant to proving that defendant committed the arson with "willful and malicious" intent, one of the elements of Penal Code section 451. Finally, the Attorney General argues that the evidence was relevant because it corroborated Mann's testimony regarding defendant's increasing frustration and obsession with Danaher and the divorce. We agree. As in *Barnett*, this evidence demonstrates the hostility defendant felt for Kim and Danaher. It showed the bitter nature of the divorce and demonstrated a motive for committing arson of Danaher's home. The evidence tended to support the prosecution's claim that defendant's frustration and hatred were increasing, since three out of the four incidents occurred during the two-month period before the fire. The court excluded evidence of other wrongs committed by defendant during the divorce (see fn. 2), but admitted

evidence of the threats toward Kim or Danaher. The trial court did not abuse its discretion in finding this evidence relevant.

We turn now to defendant's assertion that this evidence was inadmissible pursuant to section 1101. "Evidence that a person committed a crime or other wrong is admissible when it logically, naturally and by reasonable inference is relevant to show some fact at issue, such as motive, and intent, other than the person's disposition to commit such acts." (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1023 citing *People v. Daniels* (1991) 52 Cal.3d 815, 856 and Evid. Code, § 1101.) Because this evidence was offered to prove motive, intent, and the willful and malicious nature of the act, it falls within the purview of section 1101, subdivision (b). The trial court did not abuse its discretion when it determined that this evidence was admissible.

Defendant also argues that the trial court abused its discretion in admitting this evidence because its prejudicial effect outweighed its probative value under section 352. Defendant argues that it was "only minimally relevant to any disputed issues of motive or intent, and its potential to inflame the jury was extremely high." Again, we find no error. The evidence was not unduly prejudicial within the meaning of section 352 because it did not amount to "' "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."' " (*People v. Padilla* (1995) 11 Cal.4th 891, 925; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) As indicated above, the evidence was probative of several issues: intent, motive, and the willful and malicious nature of the act. It offered considerable support for the prosecution's theory that defendant committed the arson because of his anger and frustration with Danaher.

Defendant also argues that this error requires reversal because there is a reasonable probability it affected the outcome of the trial. Defendant argues that other than the improperly admitted evidence, most of the prosecution's evidence of defendant's attitude toward the divorce and Danaher consisted of the testimony of Mann, defendant's

"emotionally and psychologically troubled former girlfriend," whose bias "was manifest" and whose reliability "was open to serious question." Even if there was error in admitting this evidence, it was harmless. There was evidence of defendant's negative attitude toward the divorce other than the challenged evidence and the testimony of Mann.

Kim testified that defendant reacted angrily when she first told him she wanted a divorce. He did not want a divorce and did not want her to see an attorney. He begged her not to serve him personally and asked that he be allowed to pick up the petition at her attorney's office. A couple of days later, he filed his own petition and had her personally served at home while he watched from the bushes. Kim also testified that defendant pressured her repeatedly to settle the case without an attorney and told her, in a threatening tone that she had "better settle," and that "he wouldn't go to court." When Kim confronted him about having books on incendiary devices, he reassured her that he would not harm her or their children, but said there were some attorneys he "would like to take care of."

Danaher testified that he had difficulty communicating with defendant from the time defendant started representing himself in the summer of 1997 until the time of the fire. Danaher testified about a settlement meeting with defendant in September 1997. Defendant angrily accused Danaher of prolonging the case to collect more fees. When Danaher suggested defendant could sue him, defendant responded: "'I won't sue you, I will take care of you.' " In January 1998, Danaher met with defendant again to discuss settlement. At that time, Danaher served defendant with an order to show cause regarding several items of property that were at issue in the divorce. Danaher also placed a lis pendens on three properties defendant owned until it was determined whether they were part of the marital community. Defendant wanted to sell one of the properties and was not happy about the lis pendens. During this meeting, defendant stated that he had considered suicide, but there were people he wanted to take care of first. In light of this other evidence of defendant's response to the divorce, we cannot say that there is a

reasonable probability that the jury would have reached a result more favorable to defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Defendant also argues that since the evidence at trial was "sharply conflicting," the "jury's deliberations in excess of nine hours" indicates that the issue of defendant's guilt was "far from open and shut." According to the record, the jury deliberated for seven hours, 43 minutes. Our Supreme Court has "sometimes inferred from unduly lengthy deliberations that the question of guilt was close. (E.g., *In re Martin* (1987) 44 Cal.3d 1, 51 . . . .)" (*People v. Cooper* (1991) 53 Cal.3d 771, 837 (*Cooper*).) The inference is much weaker when the case is long and complex. (*Ibid.*) In *Cooper*, a capital case, "[t]he trial lasted over three months. Dozens of witnesses testified, some about complex scientific testing. Well over 700 exhibits were admitted into evidence." (*Ibid.*) The jury deliberated for 27 hours over seven court days. The court held: "It is not surprising that the deliberations were protracted. . . . [T]he length of the deliberations demonstrates nothing more than that the jury was conscientious in its performance of high civic duty." (*Ibid.*) In this case, defendant was charged with two unrelated crimes. Excluding deliberations, the trial lasted 29 days over a period of two months. There were 51 witnesses and 208 exhibits. Here, as in *Cooper*, the length of the deliberations demonstrates nothing more than that the jury was conscientious in performing its duty. We therefore conclude that any error in the admission of this evidence was harmless.

Defendant's contention that the admission of the threats and wrongful conduct violated his state and federal constitutional right to due process is waived because it was not raised below. (*People v. Catlin* (2001) 26 Cal.4th 81, 122 (*Catlin*).) In addition, defendant does not provide any authority establishing that a state law, like section 1101, subdivision (b), permitting the admission of evidence of wrongful acts violates a defendant's right to a fair trial. On the other hand, we have determined that the disputed evidence here was material to the issues of motive and intent, was relevant to prove

willfulness and maliciousness, and was therefore admissible under section 1101, subdivision (b).

B. The Admission of Evidence that Defendant Owned How-To Books About Incendiary Devices, Alarms Systems and Divorce Tactics

At the beginning of trial, defendant made a motion to exclude evidence of 30 how-to books that he owned regarding explosives, incendiary devices, detonation, weapons, hit men, lock picking, bypassing burglar alarms, electronic eavesdropping, high-tech harassment, creating a new identity, and divorce tactics for men. Defendant objected to the admission of the books on the grounds that they were irrelevant and that they were more prejudicial than probative (§ 352). The prosecution argued that defendant's "acquisition and study of the terrorist and divorce literature was an integral part of his planning and preparation to do whatever it would take to prevent the divorce case from going to trial." The prosecution also argued that the books were additional evidence of defendant's mental state regarding the divorce and relevant to the issue of preparation for the fire.

The court granted defendant's motion in part. It ruled that the titles of 10 of the 30 books were admissible. It also held that "those portions of the books that contain references that would correlate to the evidence found at either fire . . . would be admissible . . . but only those portions of the books," subject to further hearing.

The following is a summary of the evidence that was presented at trial about the books. Mann testified that defendant kept a box of books about incendiary devices, timers, bypassing alarm systems and ways to gain an advantage in a divorce in his bedroom. Mann also testified that defendant read the books all the time and that he told her he had read each of them from cover to cover at least twice. According to Mann, one night, while reading one of the books and discussing the divorce, defendant stated: "[I] could burn down his house or blow someone up." Kim testified that her son had found a box of books about incendiary devices and bypassing alarm systems and told her about

them. She asked defendant if he was planning on hurting her or their children. He said no, "however, there [were] some attorneys he would like to take care of." Arson investigator Charcho testified that he had found the box of books wrapped in a plastic bag, hidden in a shed on defendant's property. Charcho also testified about the titles of the 10 books[5] that the trial court had found admissible. Defendant admitted that he owned the books. He claimed he did not read them from cover to cover, as Mann had testified. He testified that he had purchased some of the books so that his 14-year old son, who was trying to make a bomb, could learn to do so safely. Fire Captain Swanson testified that one of the books, Poor Man's James Bond, Volume One (PMJB), had a chapter entitled "Arson by Electronics." Captain Swanson also testified that PMJB contained information regarding ignition temperatures and flash points of ordinary combustibles and flammable liquids, discussed the use of sparks and incandescent bulbs to ignite an arson fire, and covered the use of timers for delayed ignition. Defendant testified that he had never read PMJB and knew nothing about the incendiary devices it describes.

On appeal, defendant argues that the admission of the book titles and the description of PMJB was error because they were irrelevant, because their prejudicial effect was greater than their probative value, and because their admission violated his constitutional rights to free speech and due process. Defendant divides the books into two groups: those dealing with divorce and "others." We shall address defendant's arguments as to each group.

---

[5] The ten book titles that came into evidence were: The Poor Man's James Bond, Volume I; Anarchist Cookbook; Explosive and Propellants Book; Improvised Radio Detonation; Survival Chemist Book; Technical Burglar Alarm Bypassing; High-Tech Harassment—Get Even; Ragnar's Homemade Detonators; How to Lose Your Ex-Wife; and Divorce Tactics, Screw the Bitch.

1. Books on Divorce

Defendant argues that the titles of the two divorce books were only marginally relevant and were cumulative of other evidence regarding defendant's attitude toward the divorce. Defendant also asserts that they were "highly suggestive of a desire on [his] part to do more that thwart the progress of the divorce, including a desire to do Kim physical harm or worse, and as such their potential to prejudice the jury was very high."

All relevant evidence is admissible. (§ 351.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) The trial court has "wide discretion" in deciding the relevance of evidence. (§ 352; *People v. Kelly* (1992) 1 Cal.4th 495, 523.) This court will not disturb a trial court's exercise of discretion in admitting or excluding evidence "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice . . . ." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) A trial court's exercise of discretion will not be disturbed on appeal unless it appears that " 'the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.' " (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.) The fact that defendant owned books entitled How to Lose Your Ex-Wife[6] and Divorce Tactics, Screw the Bitch reflected defendant's anger and supported the prosecution's claims regarding motive and intent. As we observed previously, defendant's increasingly angry attitude toward the divorce was one of the prosecution's main themes and was relevant to the issues of motive, intent, and the willful and malicious nature of the crime. The books also corroborated the testimony of Kim and

---

[6] This is the title that was read into the record. The full title of the book was "How to Lose Your Ex-Wife Financially Forever."

Mann about defendant's attitude toward the divorce. Thus, the book titles were relevant to the issues in the case.

Furthermore, we do not find the evidence unduly prejudicial within the meaning of section 352 because it did not amount to "' "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."' " (*People v. Padilla, supra*, 11 Cal.4th at p. 925; *People v. Gionis, supra,* 9 Cal.4th at p. 1214.) This evidence illustrated the depth of defendant's anger over his divorce and was tied to the issues in the case. The prosecutor identified the books by title only and asked the arson investigator whether the two books were among the books he had found on defendant's property. This was the only mention of the two divorce books. There was no testimony about the contents of the books. Neither the books nor excerpts from the books came into evidence. Given the very limited mention of the book titles, there was little likelihood that they would inflame the jury. Thus, the trial court did not abuse its discretion in admitting the evidence of the two books titles on divorce.

2. Books About Explosives, Detonators, Incendiary Devices and Burglar Alarms.

Defendant argues that the court's ruling regarding this group of books requires reversal because it is internally inconsistent. The court held that the titles of eight books were admissible. The court also held that only those portions of the books that described procedures that were used to set the fires at issue in this case were admissible. Defendant argues that since the book titles referenced the "highly charged worlds of espionage, anarchy, and survivalism," and were not limited to the facts in the case, like the testimony regarding the book's contents, they were irrelevant. We find no error in the admission of the eight book titles in this group.

The arson count included special allegations that defendant "committed the offense . . . by the use of a device designed to accelerate the fire" and a "device designed to delay ignition." (Pen. Code, § 451.1, subd. (a)(5).) Three of the titles in this group,

Explosive and Propellants Book, Improvised Radio Detonation, and Ragnar's Homemade Detonators, refer to accelerants and delayed ignition. As such they are relevant to the issues tendered in the special allegations. There was evidence that the three incendiary devices used in the Studio fire were very similar to the device used in the Danaher fire. In addition, only one of the three devices found at the scene of the Studio fire had detonated. Defendant had purchased the books between the time of the Studio fire and the Danaher fire. In ruling on the admissibility of this evidence, the court observed that the books may have been relevant to show that defendant sought more information regarding incendiary devices, to insure that the devices worked properly in the second fire. Technical Burglar Alarm Bypassing was relevant to the issue of plan and preparation, to insure access to the premises. High Tech Harassment—Get Even was relevant to the prosecution's claim regarding motive and intent to commit arson. The prosecution argued that defendant burned down Danaher's home because he was angry with Danaher over Danaher's role in the divorce proceedings. Although the title Poor Man's James Bond may invoke images of espionage, Captain Swanson testified that the book contained information regarding the ignition and flash points of common combustibles and discussed the use of incandescent bulbs to ignite fires, as well as the use of timers for delayed ignition. The testimony thereby linked the information in the book directly to the devices used in the Danaher fire. The last two books in this group are the Anarchist Cookbook and the Survival Chemist Cookbook. Defendant argues that the references to anarchism and survivalism are inflammatory. However, these titles involve chemistry, a topic that is relevant to the arson fires in this case. Evidence that defendant read these books is relevant to the issues of plan and preparation and the ability to carry out the arson. The trial court's finding that the evidence was relevant was not an abuse of discretion.

The court carefully crafted its order to insure that the probative value of the evidence outweighed any prejudicial effect. First, it admitted evidence regarding only

one-third of the books the prosecution sought to use. Second, it admitted only the titles of the books and required a further hearing before any of the books' contents could come in. Third, it limited the evidence regarding the books' contents to those matters that related to the two fires at issue in the case. As a result, the prosecution only got in evidence regarding the contents of one of the books on its list. Fourth, the court excluded the most inflammatory titles, including books regarding hit men, automatic weapons, silencers, and dynamite.

Furthermore, any error in the admission of these titles was harmless. Kim had already testified that defendant had books on incendiary devices and bypassing alarm systems. Mann had already testified that defendant read books about incendiary devices, timers, and bypassing alarm systems. The recitation of the books' titles by the arson investigator added little to the record. Neither the books nor excerpts from the books were entered into evidence. Captain Swanson was only questioned about the contents of one of the books. We find no abuse of discretion in the admission of the book titles.

Defendant's contentions that the admission of the book evidence violated his state and federal constitutional rights to due process and freedom of speech are waived because they were not raised below. (*Catlin*, *supra*, 26 Cal.4th at p. 122.) Furthermore, defendant was not charged with any crimes arising out of his possession of the 10 books. He was charged with the arson of a home. The book evidence was relevant to show motive, intent, preparation, and ability to commit the crime. Defendant's reliance on *Castro v. Superior Court* (1970) 9 Cal.App.3d 675 (*Castro*) is misplaced. The defendants in *Castro* were charged with disturbing the peace and conspiracy to disturb a school meeting after organizing a series of school walkouts to protest conditions that provided them with an inferior education. The court held that they could not be convicted of a conspiracy arising out of a legitimate exercise of their first amendment rights. Even if the due process claim had been preserved, we find no violation, since the evidence regarding the books was properly admitted under state law.

C. Evidentiary Rulings Regarding the Testimony of Robin Mann (Defendant's Ex-Girlfriend) and Michael McCarthy, Jr. (Defendant's Nephew)

Defendant contends that the trial court erred both in the exclusion and admission of evidence during the testimony of Mann and Michael. Defendant asserts that the errors require reversal because his defense depended on his ability to persuade the jury that the testimony of these two witnesses was unreliable. Defendant also asserts that these errors violated his constitutional rights of confrontation and due process. We do not agree.

1. Exclusion of Evidence of Criminal Charges Against Robin Mann

Defendant asserts that the court committed error when it excluded evidence of criminal charges filed against Mann in San Mateo County arising out of an allegedly false emergency call she made on August 20, 1998. Mann called 911, identified herself as Kim, and reported that defendant had left a message on her answering machine in which he threatened to kill himself. Mann was charged with making a false report of an emergency (Pen. Code, § 148.3, subd. (a)), a misdemeanor. A criminal complaint was filed against Mann on December 11, 1998. She was arraigned on January 12, 1999 and the charges were dropped on February 2, 1999.

Defendant argued that the evidence of the charges was relevant to Mann's credibility. Defendant also argued that the evidence was relevant to Mann's motives for contacting arson investigators on December 17, 1998, and changing her story about the times that defendant was with her the two nights before the Danaher fire. Defendant admitted that he had no evidence that Mann had struck a deal with the Santa Clara County District Attorney that resulted in the charges being dropped in San Mateo County. He argued that the evidence was relevant to impeach defendant's testimony that she had changed her story out of a sense of moral obligation and that the real reason Mann came forward at that time was to curry favor with the authorities in light of the pending criminal charges. The prosecutor argued that the San Mateo County charges had no nexus to the arson case and that their admission would be unduly time consuming and

should therefore be excluded under section 352. The trial court found the evidence "very slightly relevant" to the issue of Mann's credibility but excluded the evidence under section 352 because it would be too time consuming to try the misdemeanor false report case within the arson case.

There was a factual issue as to whether the report was false. While Mann admitted to using Kim's name, she maintained that defendant had called her threatening suicide. Defendant denied leaving such a message. Since presentation of this evidence would have required the jury to determine the truth or falsity of the charges against Mann, we find no abuse in the court's decision to exclude it because it would "necessitate undue consumption of time." (§ 352.)

Furthermore, any error in excluding this evidence was harmless. Mann's lack of credibility was one of the main defense themes and defendant went to great lengths to attack Mann's credibility. Mann admitted that she had changed the story she told arson investigators about the times defendant was with her the two days before the fire. Mann testified the she was frequently angry with defendant and that they were always fighting. Mann admitted that she had twice changed the story she told investigators about a letter she had written to William Faulkner, the attorney representing defendant's opponent in an unrelated civil action that was pending at the time of the Danaher fire. Mann testified that she had tried to stay out of the McCarthy's divorce proceedings. However, she admitted to sending anonymous letters to Kim and Danaher regarding actions defendant had taken in the divorce proceedings. Mann admitted that she was despondent and had tried to commit suicide while dating defendant, that she had broken into defendant's vehicle on one occasion, and that she had broken into his garage another time.

During their relationship, defendant secretly recorded a number of messages that Mann had left on his answering machine. At trial, the jury heard testimony regarding several of the messages. The jury also heard the tape recordings of 30 messages. The phone messages were offered to impeach Mann's testimony on a number of points. In

several messages, Mann was angry and jealous because defendant had gone to a party with another woman. She also taunted defendant about her intentions to go to the authorities. For example, on March 19, 1998, after complaining that defendant had gone to a party without her, Mann told defendant that their "truce [was] off" and that she was going to tell arson investigators about his "nice little escapade." This message tended to impeach her testimony that she had gone to the authorities out of a sense of moral obligation. In his closing, defendant argued that Mann had changed her testimony because she "was angry at [defendant], because she was jealous of [defendant], because she [was] mentally unstable, because she [was] obsessed with defendant, because she lies on principle." He also argued that Mann was extremely jealous of defendant's relationships with other women and that she lied to help convict defendant. Defense counsel also argued that Mann had called in a false report that defendant was suicidal. Thus, while defendant did not get in evidence about the criminal charges arising out of the allegedly false report, he used the fact of the false report to attack Mann's credibility. In light of defendant's extensive cross examination of Mann and the attack on her credibility, it is not reasonably probable that a result more favorable to defendant would have been reached had the evidence of the criminal charges against Mann been admitted. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

2. Mann's Testimony that Defendant Was Annoying Female Patrons of the Mountain Winery.

Defendant also asserts that it was error for the court to admit Mann's testimony that Ravi Kumra, the owner of the Mountain Winery, had told her that defendant was "trying to hit on a lot of [Kumra's] friends and . . . was annoying [Kumra's] female friends" and that Kumra had banned defendant from the Mountain Winery for that reason. This testimony came in to explain one of the taped messages that Mann had left on defendant's answering machine. In the message, Mann had stated: "You have just

made another enemy. And don't underestimate me." According to Mann, the "enemy" was Kumra.

Defendant objected to the testimony on the ground that it was hearsay. Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200.) In this case, Kumra's statements were not being offered for the truth of the matters stated therein, but to explain Mann's use of the word "enemy" in the telephone message. The statement is therefore not hearsay and is not subject to exclusion under the hearsay rule (§ 1200, subd. (b)). Consequently, the trial court did not abuse its discretion in admitting this evidence.

3. Michael McCarthy, Jr.'s, Testimony Regarding Conclusions He Drew From Defendant's Statements

Defendant also contends that the trial court erred when it permitted Michael to testify about inferences he drew from defendant's admonition to stay away from the Studio over the holidays. Michael testified as follows:

"Q [By Prosecutor:] Did [defendant] explain why he was telling you not to go to the Karate Studio during this particular holiday break?

"A No.

"Q Did you ask why?

"A No, I didn't need to.

"Q Did you believe - -

"[Defense Counsel]: Objection. Move to strike his conclusion. The answer is yes or no.

"THE COURT: Overruled.

"Q (BY [Prosecutor]:) Why did you believe you didn't need to ask?

"A It was implied that the Karate Studio would be burning down, therefore it was not a good idea to be there during the break.

"Q Was that statement by the defendant made to you during a discussion of burning down the Karate Studio or was this something that you inferred because of the prior conversations you had had with him about a fire?

"A It was something I inferred."

Defendant claims it was error to permit this testimony since it was "based solely on the witness's unfounded opinion," citing section 800. Section 800 states: "If a witness is not testifying as an expert, his [or her] testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his [or her] testimony." "'[A] lay witness may testify in the form of an opinion only when he [or she] cannot adequately describe his [or her] observations without using opinion wording. . . .' " (*People v. Miron* (1989) 210 Cal.App.3d 580, 583.) "Where the witness can adequately describe his [or her] observations, his [or her] opinion or conclusion is inadmissible because it is not helpful to a clear understanding of [the] testimony." (*Ibid*., italics omitted.) Michael's testimony regarding the inference he drew from defendant's statement runs afoul of these rules.

However, we find that any error in the admission of this evidence was harmless because Michael's opinion was based on the fact that defendant had asked him several times before to burn down the Studio, a fact that he had already testified to at trial. In addition, the testimony makes clear that the conclusions Michael drew were based on his own inferences and not on any statements by defendant. Furthermore, defendant engaged in extensive cross examination of Michael during which Michael admitted to being a recovering alcoholic, to repeatedly lying to and misleading investigators after the Studio fire, and to obtaining immunity from prosecution before agreeing to talk further to investigators. It is not reasonably probable that a result more favorable to defendant

would have been reached in the absence of the error. (*Watson, supra,* 46 Cal.2d at p. 836.)

4. Exclusion of Michael's Statements to Police Investigators.

Defendant also asserts that the court erred when it sustained the prosecutor's hearsay objections during defendant's cross examination of Michael about his interview with sheriff's investigators on February 27, 1998. Defense counsel asked Michael: "And you told the officers 'I don't think my uncle is the kind of person to start a fire'?" The prosecutor objected on the grounds of hearsay. The defense responded, "These are statements that [Michael] made." The hearsay objection was sustained. This exchange followed:

> "Q [By Defense Counsel:] Do you recall what your responses were to questions about whether your uncle was involved in the Danaher fire?
>
> "A I believe that I said that I didn't think - -
>
> "[Prosecutor]: I object to anything he said. He can answer yes or no to that question.
>
> "THE COURT: Sustained."

There was no further response and no motion to strike the partial answer. Defendant argues the court erred in sustaining the hearsay objections since the testimony is a prior inconsistent statement that is admissible under section 1235. Evidence that defendant had previously told officers that he did not think defendant was the kind of person who would start a fire is inconsistent with Michael's testimony that defendant had offered to forgive a $4,000 debt if Michael burned down the Studio. We therefore agree that it was admissible as an exception to the hearsay rule under section 1235.

However, any error in the exclusion of this evidence was harmless. Anticipating that Michael's credibility would be an issue, the prosecutor had Michael testify on direct examination about the fact that he had lied to investigating officers. Michael stated that he was lying on February 27, 1998, and May 1, 1998, when he told investigating officers that he did not know anything about the Studio fire and when he denied telling Greg, Jr.,

that defendant had offered him money to burn down the Studio. Michael also admitted on direct that on February 27, 1998, he had "indicate[d] to [the] deputies . . . that the defendant . . . was in no way involved in the Karate Studio fire." This testimony is almost identical to the testimony that defendant sought to bring in as a prior inconsistent statement on cross-examination. Since this same point was made in the direct examination and given the extent of the cross examination of Michael including multiple admissions that he had lied to the police, it is not reasonably probable that a result more favorable to defendant would have been reached had Michael been allowed to testify further regarding this issue on cross. (*Watson, supra*, 46 Cal.2d at p. 836.)

5. Claims of Constitutional Error

Defendant's claims that these four errors violated his rights under the confrontation and due process clauses of the federal Constitution are waived because they were not raised below. (*Catlin, supra*, 26 Cal.4th at p. 122.) Even if the claims had been preserved, we are not persuaded that there were any constitutional violations. Defendant asserts that these errors violated his right of confrontation because they "prevented [him] from questioning either witness about impeaching facts." The case defendant cites is inapposite because it addresses a complete foreclosure of any defense cross-examination on the subject of bias of a prosecution witness. (See *Davis v. Alaska* (1974) 415 U.S. 308, 315-318) While the United States Supreme Court has rejected a complete foreclosure of any questioning into the area of potential bias of a witness, it has held that the trial court may limit the scope of such cross-examination by applying traditional rules of evidence. (See, e.g., *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) The confrontation clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20; italics in original.) As noted above, defendant was allowed to present extensive impeachment evidence on both

Michael and Mann. We find no violation of his right of confrontation. Having found no error as to the testimony of Mann and harmless error as to Michael's testimony, we do not find any due process violation.

D. Jury Instruction on Testimony of Immunized Witness (Refusal to Modify CALJIC NO. 2.20)

Defendant asserts that it was reversible error for the court to refuse his request to modify CALJIC No. 2.20,[7] the standard jury instruction listing factors that the jury is to consider in assessing witness credibility, to include the phrase "whether the witness is testifying under a grant of immunity." In April 1999, Michael agreed to cooperate with police investigators after being granted immunity from prosecution for any violation of law arising out of prior statements that he had made to investigators that protected defendant. After receiving a verbal promise of immunity from the prosecutor, Michael changed his story and told investigators about defendant's offer to erase Michael's $4,000 debt if Michael burned down the Studio. The promise of immunity was subsequently reduced to writing.

---

[7] The jury was instructed with the following language from the version of CALJIC No. 2.20 that was in effect at the time of the trial: " 'Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness testified; [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest or other motive; [¶] The existence or nonexistence of any fact testified to by the witness; [¶] The attitude of the witness toward this action or toward the giving of testimony; [¶] A statement previously made by the witness that is consistent or inconsistent with his or her testimony; [¶] An admission by the witness of untruthfulness.' "

In *People v. Hunter* (1989) 49 Cal.3d 957, 976-978 (*Hunter*) our Supreme Court addressed the issue of the proper jury instruction to be given in cases involving immunized witnesses. *Hunter* was a murder case. Three prosecution witnesses testified under a grant of immunity from prosecution for their roles as accessories after the fact in helping the defendant flee to Mexico. (*Id.* at p. 976.) The defendant requested a jury instruction that the testimony of the immunized witnesses "must be viewed with 'suspicion' and examined with 'greater care and caution' than the 'testimony of an ordinary witness.' The trial court modified the requested instruction, directing the jury to determine whether an immunized witness's 'testimony has been affected by it [*sic*] or by his prejudice against the defendant,' but to weigh the witness's credibility 'by the same standards by which you determine the credibility of other witnesses.' " (*Ibid.*) The trial court also gave CALJIC No. 2.20. The court explained that while special cautionary instructions are required when an accomplice testifies, the same rule does not apply to immunized witnesses. The court observed that "California law . . . provides that a witness ordered to testify over a claim of self-incrimination shall be given transactional immunity. [Citations.] The prosecution's leverage over the witness is thereby sharply diminished, as is the witness's motive to falsify. Thus, . . . 'whatever consideration [an immunized witness] may expect for testifying, the direct, compelling motive to lie is absent.' [Citation.]" (*Id.* at p. 978.) The court concluded that the "general instruction on witness credibility, coupled with the modified instruction specially directing the jury to determine whether the immunized witness's credibility had been affected by the grant of immunity, adequately informed the jury of the necessity to weigh the motives of the immunized witnesses." (*Ibid.*)

The defendant in *People v. Hampton* (1999) 73 Cal.App.4th 710, 721 (*Hampton*) asked "the court to instruct the jury that the testimony of a witness who had been granted immunity should be viewed 'with distrust,' by adapting former CALJIC No. 3.18, which stated such rule regarding accomplice testimony." (Italics omitted.) The trial court

refused. Instead, it gave a modified version of CALJIC No. 2.20, which included " 'Whether the witness is testifying under a grant of immunity' " among the factors that the jury is to consider in determining the believability of a witness. (*Ibid.*) The appellate court found no error. The court explained: "the legislative general rule, . . . section 411, provides that '[e]xcept where additional evidence is required by statute [e.g., Penal Code section 1111 requiring corroboration of an accomplice's testimony], the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.' Whether the testimony of even an 'interested' witness should be given full credit is a question of fact exclusively for the jury. That is a strong reason why the cases have held that the fact a witness was given immunity is appropriately placed in CALJIC No. 2.20. (*People v. Harvey* (1984) 163 Cal.App.3d 90, 113 . . . ; *People v. Echevarria* [(1992)] 11 Cal.App.4th [444,] 450, 451, fn. 1. [(*Echevarria*)])" (*Id*. at p. 722.) The appellate court in *People v. Echevarria, supra,* 11 Cal.App.4th at page 450, acknowledged "the logic behind the concept that an immunized witness's testimony may not be as trustworthy as a nonimmunized witness's testimony," but opined that: "[I]t is a better practice to include factors such as immunized testimony to the list of considerations contained in CALJIC No. 2.20 rather than telling the jurors which witnesses they should or should not trust because, as they are specifically instructed, they 'are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.' "

The issue presented here is different than the issues in *Hunter, Echevarria,* and *Hampton*. In each of those cases, the defendant requested a special instruction that the testimony of the immunized witness be viewed with "distrust" or "suspicion." (*Hunter, supra,* 49 Cal.3d at p. 976 [defense request for instruction that testimony of immunized witness be viewed with " 'suspicion' " and examined with " 'greater care and caution' " than testimony of an ordinary witness]; *Echevarria, supra,* 11 Cal.App.4th at p. 449 [defendant requested instruction that testimony of immunized witness "be viewed with distrust" and assessed " 'with caution because of the considerable interest such a witness

has in testifying in a manner which is acceptable to the prosecutor' "]; *Hampton, supra,* 73 Cal.App.4th at p. 721 [request for instruction that testimony of immunized witness be "viewed 'with distrust' "].) In each case, the trial court denied the request and gave an alternate instruction. In *Hunter, supra,* 49 Cal.3d at page 976, the jury was instructed to determine whether the witness's testimony was affected by the grant of immunity or prejudice against the defendant. In *Hampton, supra,* 73 Cal.App.4th at page 721 and *Echevarria, supra,* 11 Cal.App.4th at page 450 the trial court modified CALJIC 2.20 and added the phrase "Whether the witness is testifying under a grant of immunity" to the factors the jury is to consider in assessing witness credibility. In each case, the court held that it was not error to refuse the special instruction and approved of the alternate instruction given. (*Hunter, supra,* 49 Cal.3d at p. 978, *Echevarria, supra,* 11 Cal.App.4th at p. 450 and *Hampton, supra,* 73 Cal.Ap.4th at pp. 722-724.)

In this case, defendant did not request a special instruction. Instead, he asked the court to modify CALJIC No. 2.20 and add the phrase "[w]hether a witness [was] testifying under a grant of immunity" to the factors the jury is to consider in assessing witness credibility. The trial court refused, reasoning that Michael was not formally granted immunity by the court; that the immunity came from the District Attorney's office, not the court.

Defendant argues that this is a distinction without a difference and that *Hampton* involved a prosecutorial grant of immunity. The Attorney General argues that the promise Michael received was not the equivalent of a court-approved immunity agreement and that the immunity did not apply to the Studio fire, only to events after the fire. We note that the immunity in *Echevarria* did not apply to the murder that was at issue in the case. It applied to uncharged wrongs that occurred before and after the murder. (*Echevarria, supra,* 11 Cal.App.4th at pp. 448-449.) The Attorney General also argues that the "requested modification would have rendered the neutral pattern instruction regarding a method for assessing the believability of all witnesses into an

argumentative pinpoint instruction that was not supported by the evidence." We note that CALJIC 2.20 was revised after the trial in this case and that the revised jury instruction includes "Whether the witness is testifying under a grant of immunity" among the factors to be considered by the jury. However, we need not decide whether the court's refusal to modify CALJIC No. 2.20 was error, since we hold that any error in refusing to modify the instruction was harmless.

The prosecutor told the jury in his opening statement that Michael was testifying under a grant of immunity and even outlined the terms of the immunity agreement. Defendant's opening statement likewise advised the jury that Michael was testifying pursuant to a promise of immunity.[8] Michael testified at length about the immunity agreement on both direct and cross-examination. The letter stating the terms of the immunity agreement was in evidence. During his closing argument, defendant argued that Michael should not be believed because he was an admitted liar, that he had completely changed his statement to authorities after receiving the immunity agreement, and that the agreement illustrated his bias and motive to frame defendant. Furthermore, the court instructed the jurors pursuant to CALJIC No. 2.20 that they should consider Michael's "bias, interest and motive" in assessing his truthfulness. In light of the extensive evidence and argument regarding the immunity agreement, we cannot say that it is reasonably probable that a result more favorable to defendant would have been

---

[8] Defense counsel stated in his opening that "This testimony, ladies and gentlemen, that Michael, Jr. is going to give is bought and paid for with items more valuable than money. It's guaranteed that he will not be charged in a criminal case, but conditioned on his telling a certain version of the facts. They're not saying get immunity, tell the truth, but get immunity if you say what we want you to say." In *Echevarria, supra,* 11 Cal.App.4th at page 449 the court found that a defense jury instruction which suggested that an immunized witness has an interest in testifying in a manner which is acceptable to the prosecutor is misleading because it erroneously suggests that the prosecutor is interested in presenting testimony that is false. (*Id.* at p. 449.)

reached had the jury heard the proposed modification to CALJIC No. 2.20. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

As with the other errors asserted on appeal, defendant claims that the error requires reversal because it violated his constitutional right of due process. Defendant failed to assert this constitutional claim below and it is therefore waived. (*Catlin, supra*, 26 Cal.4th at p. 122.) Even if the error had been preserved, we do not see any violation of defendant's due process rights.

E. Jury Instruction on Reasonable Doubt (CALJIC No. 2.90)

Defendant next contends that the trial court erred in instructing the jury on reasonable doubt as set forth in the 1994 revised version of CALJIC No. 2.90. He contends that this instruction is constitutionally deficient because it fails to guide the jury regarding the "degree of certainty" required for a finding of guilt and may be confused with the clear and convincing standard. We disagree.

We rejected defendant's contentions in *People v. Hurtado* (1996) 47 Cal.App.4th 805, 815-816 (*Hurtado*) and *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263 (*Tran*) and concluded that the instruction satisfied federal due process concerns. As we explained in *Tran*, CALJIC No. 2.90 was revised in 1994 "to delete the phrases ' "and depending on moral evidence" ' and ' "to a moral certainty" ' in response to a suggestion by the California Supreme Court in *People v. Freeman* (1994) 8 Cal.4th 450, 504-505 . . . . Our Supreme Court was similarly responding to concerns of the United States Supreme Court, as explained in *Victor v. Nebraska* (1994) 511 U.S. 1 . . . . As the California court explained, '[m]aking these changes [deleting the phrases using the terms moral evidence and moral certainty], and no others, would both avoid the perils that have caused appellate courts to caution trial courts against modifying the standard instruction, and satisfy the concerns the high court has expressed regarding that instruction.' (*People v. Freeman, supra*, 8 Cal.4th at p. 504.) [¶] Moreover, we believe that in the context of

the complete instruction, the use of the phrase 'abiding conviction,' as a conviction which will last over time, adequately encompasses the appropriate depth or intensity of the jury's certainty and satisfies the requirements of due process." (*Tran, supra,* 47 Cal.App.4th at p. 263.) We continue to agree with the position we adopted in *Hurtado* and *Tran* and with other courts that have reached the same conclusion. (See *People v. Haynes* (1998) 61 Cal.App.4th 1282; *People v. Aguilar* (1997) 58 Cal.App.4th 1196; *People v. Godwin* (1996) 50 Cal.App.4th 1562; *People v. Barillas* (1996) 49 Cal.App.4th 1012; *People v. Carroll* (1996) 47 Cal.App.4th 892; *People v. Light* (1996) 44 Cal.App.4th 879; *People v. Torres* (1996) 43 Cal.App.4th 1073.) Thus, we conclude that the trial court did not err in instructing the jury pursuant to CALJIC No. 2.90.

F. The Use of CALJIC No. 17.41.1

Defendant asserts that the judgment should be reversed because the judge instructed the jury with CALJIC No. 17.41.1,[9] which instructs jurors to inform the court if any juror refuses to deliberate or expresses an intent to disregard the law or decide the case on an improper basis. Defendant contends CALJIC No. 17.41.1 discourages the candid exchange of views between jurors during deliberations and compromises the secrecy of the jury's deliberations. Defendant also asserts that it is an improper anti-nullification instruction and that use of the instruction was structural error that requires reversal. The Attorney General responds that defendant has waived this error by failing to raise it below and that even if there was error, it was harmless.

---

[9] CALJIC No. 17.41.1 states: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." The full text of CALJIC No. 17.41.1 was given in this case, verbatim.

"It is said that the failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. [Citations.] . . . Accordingly . . . an appellate court may ascertain whether the defendant's substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We will therefore review defendant's instructional error claim to determine whether his substantial rights have been affected.

The California Supreme Court recently addressed the validity of CALJIC No. 17.41.1 in *People v. Engelman* (July 18, 2002, S086462) __ Cal.4th __ [49 P.3d 209, 121 Cal.Rptr.2d 862] (*Engelman).* The court determined that CALJIC No. 17.41.1 "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict." (*Engelman, supra,* __ Cal.4th at [p. 1].) The court was not persuaded that, "merely because CALJIC No. 17.41.1 might induce a juror who believes there has been juror misconduct to reveal the content of deliberations unnecessarily (or threaten to do so), the giving of the instruction constitutes a violation of the constitutional right to trial by jury or otherwise constitutes error under state law." (*Id.* at [p. 7].)

The court explained: "[A]lthough the secrecy of deliberations is an important element of our jury system, defendant has not provided any authority, nor have we found any, suggesting that the federal constitutional right to trial by jury (or parallel provisions of the California Constitution, or other state law) requires absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct, or that the constitutional right constitutes an absolute bar to jury instructions that might induce

jurors to reveal some element of their deliberations." (*Engelman, supra,* ___ Cal.4th at [pp. 6-7].)

The court in *Engelman* found that "[t]he instructions as a whole fully informed the jury of its duty to reach a unanimous verdict based upon the independent and impartial decision of each juror. (CALJIC No. 17.40 ['The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must decide the case for yourself . . . .']; CALJIC No. 17.50 [instructing that in order to reach a verdict, 'all twelve jurors must agree to the decision'].)" (*Engelman, supra,* ___ Cal.4th at [pp. 7-8].) As the court in *Engelman* noted, CALJIC No. 17.41.1 "does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment." (*Id.* at [p. 8].)

The instructions in this case likewise conveyed the necessity for each juror to exercise his or her impartial, independent judgment. The court here instructed the jurors with CALJIC Nos. 17.40 and 17.50, using the same language cited by the court in *Engelman*. We therefore reject the argument that CALJIC No. 17.41.1 threatens the independence of individual jurors and genuine juror unanimity because it might be used to coerce minority or holdout jurors.

In spite of its holdings, the *Engelman* court recognized that "CALJIC No. 17.41.1 has the potential needlessly to induce jurors to expose the content of their deliberations" (*Engelman, supra,* ___ Cal.4th at [p. 11]) and "[t]he threat that the contents of the jury's deliberations might be reported to judge could chill the free exchange of ideas that lies at the center of the deliberative process." (*Id.* at [p. 12].) The court "in the exercise of [its] supervisory power" directed that "CALJIC No. 17.41.1 not be given in trials conducted in the future" because it believed that the instruction "creates a risk to the proper functioning of jury deliberations and that it is unnecessary and inadvisable to incur this risk." (*Id.* at [p. 15].)

As to the argument that CALJIC No. 17.41.1 infringes upon defendant's constitutional right to jury nullification, it is without merit in light of *People v. Williams* (2001) 25 Cal.4th 441, 449-463 (*Williams*). The *Williams* court declared: "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law. . . . A nullifying jury is essentially a lawless jury." (*Id*. at p. 463.) The court explained that although the possibility of jury nullification exists because of certain procedural aspects of our criminal justice system, a defendant does not have a constitutional right to that possibility. (*Id*. at pp. 449-451.)

We also find unpersuasive defendant's argument that the use of CALJIC No. 17.41.1 was structural error and was therefore reversible per se.[10] A structural error is a "defect[] in the constitution of the trial mechanism . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) Unlike trial errors, that is, those which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt" (*id*. at pp. 307-308), structural errors are "reversible per se, without regard to the question of prejudice." (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335 (*Molina*).)

We disagree that the error is one that necessarily infects the entire trial process and renders the trial fundamentally unfair. "All the instruction does is to require jurors to inform the court of juror misconduct. It does not ' "affect[] the framework within which the trial proceeds," ' nor does it 'necessarily render a criminal trial fundamentally unfair

---

[10] Although the defendant in *Engelman, supra*, __ Cal.4th __, [p. 5] argued that there was structural error, the court did not reach that issue.

or an unreliable vehicle for determining guilt or innocence.' [Citations.]" (*Molina, supra,* 82 Cal.App.4th at p. 1335.) We agree with *Molina* that harmless error review is appropriate. (*Ibid*.)

There is no indication in this case that the use of CALJIC No. 1741.1 had any affect whatsoever on the verdict. As in *Engelman,* the jury here "did not contact the court for any assistance or otherwise indicate that any problem had developed with respect to deliberations." (*Engelman, supra,* __ Cal.4th __ [p. 3].) After 29 days of evidence and argument, the jury deliberated for seven hours and 43 minutes over the course of two days. The jury did not request any readbacks. The only communication from the jury during their deliberations was a note asking to see the calendars that were in the courtroom. The jury subsequently cancelled that request. There was no jury deadlock and there were no holdout jurors. There was no report of any juror refusing to deliberate or refusing to follow the law. There were no complaints of misconduct by any of the jurors and no inquiry by the court. We have no reason to believe that CALJIC No. 17.41.1 improperly impacted the jurors' deliberations in this case and find no error in giving the instruction.

G. Cumulative Error

Defendant contends that even if none of his claims of error, alone, is considered prejudicial, the cumulative effect of the errors compels reversal of his convictions. We disagree. Whether considered separately or in combination, the few errors that may have occurred during defendant's trial, as discussed above, were harmless. (*People v. Barnett, supra*, 17 Cal.4th at p. 1168.)

DISPOSITION

The judgment is affirmed.

Elia, J.

WE CONCUR:

Premo, Acting P.J.

Wunderlich, J.